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No. 87-2108

In the Supreme Court of the United States

OCTOBER TERM, 1988

BLACKFEET INDIAN TRIBE, PETITIONER

v.

THE MONTANA POWER COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Act of February 5, 1948, ch. 45, 62 Stat. 17, 25 U.S.C. 323 *et seq.*, authorized the Secretary of the Interior, with the consent of the Blackfeet Tribe, to grant pipeline rights-of-way over tribal land for a term of 50 years.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 838 F.2d 1055. The opinion of the district court (Pet. App. 12-18) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19) was entered on February 24, 1988. A petition for rehearing was denied on March 21, 1988 (Pet. App. 20). The petition for a writ of certiorari was filed on June 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the 1960s, the Secretary of the Interior (Secretary) granted the Montana Power Company five rights-of-way for pipelines across lands on the Blackfeet

Indian Reservation in Montana. The Blackfeet Indian Tribe (Tribe) consented to the rights-of-way; each had a term of 50 years. The Secretary approved the rights-of-way under the Act of February 5, 1948, 25 U.S.C. 323 *et seq.* (1948 Act).[1] In 1983, the Tribe filed suit against the Montana Power Company and the Secretary, alleging that the rights-of-way were limited to 20 years under the Act of March 11, 1904, 25 U.S.C. 321 (1904 Act),[2] and that the Secretary had exceeded his authority in approving rights-of-way for longer terms. The Tribe thus contended that the Montana Power Company's use of the pipelines after expiration of 20 years amounted to a trespass. Pet. App. 2-3, 12-13.

On cross-motions for partial summary judgment, the United States District Court for the District of Montana held that the Secretary had properly approved the rights-of-way for a term of 50 years (Pet. App. 12-17). The court observed that "the 1948 Act was intended to simplify the means of acquiring rights-of-way over Indian lands" (*id.* at 15) and that "[t]he plain language of the 1948 Act" (*id.* at 17) authorized the Secretary to approve 50-year rights-of-way. The 1904 and 1948 Acts "represent[ed] separate and independent means of acquiring rights-of-way" (*id.*

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[1] The 1948 Act empowered the Secretary "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands • • • held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations • • •" (25 U.S.C. 323). The Act did not limit the duration of a right-of-way. Under the governing regulation in effect when the Secretary approved the rights-of-way, a right-of-way could not exceed a term of 50 years. See 25 C.F.R. 161.19 (1960).

[2] The 1904 Act authorized the Secretary to grant rights-of-way for oil and gas pipelines over Indian lands. Such rights-of-way were limited to a period of 20 years. The Secretary, however, could grant extensions for a period of 20 years. See 25 U.S.C. 321.

at 18). Accordingly, the earlier statute's 20-year limitation did not control. The court found that "the parties expressly agreed to 50-year rights-of-way under the 1948 Act," and concluded that the Secretary, in approving these rights-of-way, had not exceeded his authority under the 1948 Act (*ibid.*).

2. The court of appeals affirmed (Pet. App. 1-10). "Since effect can be given to both the 1904 and 1948 Acts, both should be applied. This gave the Tribe a choice between either the 20-year term under the earlier statute or up to a 50-year term under the latter statute. The Tribe consented to a 50-year term. The term of years was controlled by both Acts and the Secretary did not exceed his authority in providing regulations allowing 50-year terms" (*id.* at 9-10).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner renews the contention (Pet. 6-10) that, despite the language of the 1948 Act, 25 U.S.C. 323, the statute does not authorize the Secretary to approve rights-of-way for a period exceeding 20 years. This Court has long recognized, however, that "[t]here is * * * no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). Section 1 of the 1948 Act, 25 U.S.C. 323, unambiguously provides that "the Secretary of the Interior * * * is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands * * * held in trust by the United States for individual Indians or

Indian tribes, communities, bands, or nations * * *." The statute contains no suggestion that a right-of-way must be limited to a period of 20 years. By its terms, the Secretary can approve rights-of-way "subject to such conditions as he may prescribe"; and one such condition that he had prescribed at the time pertinent here was that the grant may be for a 50-year term. See 25 C.F.R. 161.19 (1960).[4]

The legislative history confirms the straightforward meaning of the 1948 Act. Congress enacted the statute to strengthen the Department of the Interior's ability to grant rights-of-way across Indian lands for any legitimate purpose. See S. Rep. 823, 80th Cong., 2d Sess. (1948). An "explanation of the [statute's] purposes" (*id.* at 2) was set forth in the Department of the Interior's letter to the Senate (*id.* at 3-4):

> [The proposed legislation] will go a long way to satisfy the need for simplification and uniformity in the administration of Indian law. At the present time the authority of the Secretary of the Interior to grant rights-of-way is contained in many acts of Congress, dating as far back as 1875. Thus, each application for a right-of-way over Indian land must be painstakingly scrutinized in order to make certain that the right-of-way sought falls within a category specified in some existing statute, which may limit the type of right-of-way that may be granted, or the character of the land across which it may be granted.
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> * * * * *

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[4] The Secretary must first obtain permission from tribes such as the Blackfeet Indian Tribe, organized under the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, before granting a right-of-way across tribal land. See 25 U.S.C. 324.

> The proposed legislation would vest in the Secretary of the Interior authority to grant rights-of-way of any nature over the Indian lands described in the bill.
>
> * * * * *
>
> In order to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new, provision has also been made in section 4 of the bill to preserve the existing statutory authority relating to rights-of-way over Indian lands.

Congress thus intended to give the Secretary the ability to grant rights-of-way with whatever restrictions and conditions he determines are appropriate in light of his trust responsibilities to the Indians. At the same time, Congress no longer required the Secretary to base his authority on any one of a number of previous statutes, including the 1904 Act. Congress chose not to repeal the earlier statutes to avoid any confusion. By doing so, however, Congress certainly had no intention of limiting the Secretary's newly-expanded authority to grant rights-of-way.

Moreover, the Secretary has consistently interpreted the 1948 Act as not automatically incorporating the restrictions in previous rights-of-way statutes such as the 1904 Act's 20-year limitation. See, *e.g.*, 25 C.F.R. 161.19 (1960) (50-year term for all oil and gas pipeline rights-of-way); Intent to Rescind Portions of Regulations Governing Granting of Rights-of-Way Over Indian Lands, 46 Fed. Reg. 22205 (1981) ("In 1948 * * * Congress gave the Department comprehensive authority to grant rights-of-way for any purpose or any term of years and without the antiquated restrictions of the older statutes. The Bureau of Indian Affairs, however, has continued to apply the old restrictions even though it is no longer required to do so.

The rescission of these regulations would end that practice."); Proposed Rule, 51 Fed. Reg. 1391 (1986) (same). Instead, the Secretary retains the authority to prescribe conditions of such rights-of-way. Thus, the Secretary's current regulation, 25 C.F.R. 169.25(a) (1987), specifies that "[e]xcept when otherwise determined by the Secretary, rights-of-way granted * * * under the Act of February 5, 1948 * * * shall also be subject to [the 20-year term of the 1904 Act]." Of course, the Secretary's decison now to adopt as a matter of policy the 1904 Act's 20-year limitation as the norm is entirely consistent with Congress's intention of not mandating such a limitation in the 1948 Act. Accordingly, the court of appeals here properly deferred to the Secretary's reasonable and correct reading of the statutory provisions he administers. *E.g., Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).[5]

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[5] Contrary to petitioner's contention (Pet. 13-14), the decision below does not conflict with *Plains Elec. Generation & Transmission Co-op.* v. *Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976). In *Plains Electric*, the Tenth Circuit considered whether the Act of May 10, 1926, ch. 282, 44 Stat. 498, which permitted the condemnation of Pueblo Indian land under state law, had been repealed by later legislation, including the 1948 Act governing rights-of-way. The court held that the Act of April 21, 1928, ch. 400, 45 Stat. 442, 25 U.S.C. 322, which made the Pueblo Indians subject to the general laws regarding rights-of-way over tribal land, together with the 1948 Act, superseded the 1926 statute because that statute had not required the consent of the tribe or the Secretary before lands were condemned. In other words, the court of appeals concluded that the earlier statute was flatly inconsistent with the protection afforded to the Indians in the later statutes. See 542 F.2d at 1376-1381. The *Plains Electric* court had no occasion to consider the relationship between the 1948 Act and earlier right-of-way statutes such as the 1904 Act.

Finally, petitioner argues (Pet. 10-12) that the court of appeals erred in concluding that the Tribe had consented to 50-year terms for the

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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rights-of-way. Both the district court and the court of appeals found that the Tribe had consented to the 50-year terms. See Pet. App. 2, 13, 18. It has long been this Court's practice, absent extraordinary circumstances, not to disturb concurrent factual findings by an appellate court and a trial court. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, No. 86-1626 (June 19, 1987), slip op. 7-8; *Graver Tank & Mfg.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). There is no reason to depart from that practice in this case.

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